With few exceptions, mandatory access laws discriminate in favor of franchised cable operators and against all other video service providers, rather than seeking to ensure in a neutral fashion that tenants have the ability to obtain video services from some source. By their express terms or practical operation, these laws force property owners to grant only franchised cable operators access to their private property for the provision of service to residents, even when the owners have arranged for equivalent services to be provided through an alternative provider. Under such laws, while non-franchised operators are completely precluded from entering into exclusive contracts, franchised operators may enter into such contracts and enjoy their benefits whenever they so choose. In addition, property owners have proven reluctant or unwilling to contract with alternative providers where forced access via condemnation is available to the local franchisee. They simply will not suffer an overbuild of their properties even under circumstances where the franchisee's service and rates are less than optimal.

As a result of the preferential treatment of franchised operators, entry by alternative providers in mandatory access jurisdictions has been and will surely continue to be forestalled. Indeed, most ICTA members do not willingly operate in mandatory access states and the overwhelming number of their subscribers reside elsewhere. Thus, not only are alternative providers absent from a specific property such that the head-to-head competition envisioned by Adelphia simply does not occur, they avoid entire markets that are governed by a forced access regime. Thus, such laws are hardly pro-consumer as Adelphia alleges. There is nothing pro-consumer about laws that discourage competition in a franchise area and lead the tenant to have only one choice for its programming no matter where in the city the tenant resides. Accordingly, if the Commission decides to reconsider the issue of whether to preempt discriminatory mandatory access laws, it should find that preemption would serve the public interest, greatly promote competition and is clearly warranted.

Moreover, until such laws are preempted, the Commission should ban exclusive contracts in mandatory access states since only the franchised operators may execute such contracts. Providing the monopolist or near monopolist with such a competitive advantage serves no purpose whatsoever.

CONCLUSION

For the reasons discussed above, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments herein.

Respectfully submitted,

INDEPENDENT CABLE &
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Service Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
Cable Home Wiring	)	

To: The Commission

REPLY COMMENTS OF INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

The Independent Cable & Telecommunications Association ("ICTA") hereby submits these reply comments in connection with the Second Further Notice of Proposed Rulemaking (the "Second Further Notice") in the above-encaptioned proceeding.[1]

[1] DirectTV, while a member of ICTA, does not join in these comments, but rather submits its own response to the Second Further Notice.

DISCUSSION

I. The Record Establishes That Exclusive Contracts Promote Competition By New Entrants Except Where Such Contracts Are Perpetual In Nature

In its initial comments in this Second Further Notice, ICTA extensively briefed why the ability of new entrants to execute exclusive contracts with MDU owners is a critical ingredient to insuring competition in the video programming marketplace, the primary reason being to attract and justify the capital investment associated with MDU service. The vast majority of other commenters agreed that the use of exclusive contracts has proven beneficial, and especially emphasized that the MDU arena is a highly competitive one. See, e.g., Comments of U S West at 3 (opposing "artificial imposition of term caps on privately-negotiated contracts for video programming service" since MDU marketplace "already highly competitive"); Comments of Time Warner Cable at 2-3 (since provision of service to MDUs "is a highly competitive area" FCC " should continue to refrain from interfering with contracts that have heretofore been negotiated entirely by the parties involved); Comments of Tele-Communications, Inc. at 21-26 (exclusivity beneficial to MDU residents in terms of better price and service offerings); Comments of Community Associations Institute at 2-4 (exclusive contracting often brings service and rate benefits to residents); Comments of GTE Service Corporation at 13-15 (ability for new entrants to contract exclusively is "necessary to jump start competition between MVPDs"). Given the FCC's overriding objective to spark and extend competition in the provision of video services nationwide, it would appear that the MDU market is one market that should not be subjected to any further regulatory controls except where clear evidence exists of anticompetitive activity -- such as in the case of contracting in perpetuity.

The expert report of Dr. Michael D. Whinston wholly supports ICTA's conclusions in this regard. See Attachment A hereto ("Report"). Professor Whinston was retained by ICTA to analyze the competitive effects of exclusive contracts between multichannel video programming distributors ("MVPDs") and MDU owners, particularly private cable operators ("PCOs"). Professor Whinston opines "that there is little risk of competitive harm arising from the use of exclusive contracts by PCOs." Report at ¶ 7. To the contrary, his report advances a sound rationale for why exclusive dealing contracts "serve important pro-competitive functions by making exchange relationships work more efficiently." Id. at ¶ 25. At For example, the paramount ability to protect via an exclusive contract against a "socially inefficient" overbuild, i.e., one in which the PCO as an initial investor necessarily faces unrecoverable economic loss, achieves a pro-competitive result since without that ability, PCOs would not be able to invest in the MDU in the first place. Id. at ¶¶ 27-31. This is in part due to the uncertainty of the future investments which a PCO will undoubtedly incur, be it for technology upgrades, additional competitive programming services or other "non-contractible investments." Id. at ¶ 25-26. Even the level of current investment undertaken at the time of initial MDU entry is greatly affected by the ability to obtain exclusivity, since the certainty of recovery for that investment allows for supracompetitive offerings redounding to the benefit of MDU residents. When these items are considered beyond the boundaries of a single MDU, it is clear that PCO overall market entry and growth has been and will continue to be directly linked to PCO's ability to engage in exclusive contracting.

This is perhaps most dramatically evidenced, as Professor Whinston points out, by the lack of competition to incumbent franchised cable operators in mandatory access states.

Id. at ¶ 34. Mandatory access statutes prevent MDU owners and PCOs from engaging in exclusive contracts because the incumbent franchisee has a right to force entry into the MDU to provide service to residents.[2] ICTA has documented that competition is more than twice as vigorous in non-mandatory access states, and more often than not, the competition that does exist in some mandatory access states existed prior to the passage of the forced access legislation and thus the capital investment was made at a time when overbuilding was unexpected.

Equally important is Professor Whinston's analysis concerning the existence of certain factors in the MDU context militating against any conclusion that exclusive contracting by new entrants poses anticompetitive concerns. The two guiding principles leading to findings of anticompetitive effects, i.e., third party buyers or sellers negatively impacted by the exclusive contract who are not part of the negotiations prior to the contract's execution, are simply not present in the competitive milieu of MDU access battles occurring in markets where competitive alternatives exist.[3] Id. At ¶¶ 11-16. It has been well documented by all parties to this proceeding

[2] Of course, as set forth in ICTA's initial comments at 11, these mandatory access statutes do not prevent the incumbent franchised operator from engaging in exclusive contracting since alternative MVPDs do not fall within the scope of such statutes and thus cannot force an overbuild of the incumbent franchisee. While some commenters in this proceeding assert, without discussion, that mandatory access statutes allow MVPDs other than incumbent franchisees also to force access, such is not the case. See ICTA ex parte notice of Feb. 24, 1997. Thus, ICTA continues to urge this Commission at a minimum to prohibit franchised operators from obtaining exclusive contracts in mandatory access states and at a maximum to preempt discriminatory mandatory access statutes.

[3] Again, this cannot be true in mandatory access states because no negotiations actually take place -- the incumbent franchised operator has the right to force access irrespective of whether its offerings are the "best." The MDU owner's leverage to bargain amongst providers, thereby increasing programming choice, ensuring customer service protections and decreasing subscriber rates, is totally defeated. Thus, as ICTA has oft advocated, mandatory access statutes are anti-competitive, protectionist laws passed at the behest of the franchised cable industry under the guise of increasing tenant "choice." The end result is no choice, since non-franchised

that where competitive alternatives exist, MDU owners actively and aggressively solicit service proposals from numerous vendors, weighing each proposal against the others in negotiations and ultimately obtaining supracompetitive offerings in part through an exchange of exclusivity. As Professor Whinston observes, "when all affected parties are involved in the negotiations over the contract, the exclusive contract will be signed precisely when it is efficient," and thus marketplace "choice" is advanced rather than eliminated. Id. at ¶ 15.[4]

Such is typically not the case, however, with exclusive contracts lasting for the term of the franchise and all renewals and extensions, i.e., de facto perpetual contracts. In the vast majority of jurisdictions where the use of such perpetual contracts is widespread, MDU owners had no choice but to enter into contracts with a term linked to the continuation of the franchise because no competitive alternatives existed at the time.[5] When faced with a "take it or

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competitors cannot make the case for economic viability to their investors under circumstances where their market share can be eroded by the incumbent franchisee who in turn can completely insulate its market share from erosion given its sole continuing ability in such states to enter into exclusive contracts. Report at ¶ 22.

[4] This presumes, as found likely by Professor Whinston, that negative externalities across buyers would not arise because the "extremely low level" of economies-of-scale enjoyed by PCOs renders it "highly unlikely that any PCO could profitably seek to use exclusive dealing contracts for anti-competitive ends" under market conditions where "all sellers are actively competing for contracts."

[5] It is totally contrary to all evidence gathered by Congress during the passage of the 1992 and 1996 Cable Acts, as well as evidence gathered by this Commission, for Time Warner Cable to claim that competitive alternatives to cable franchisees has existed nationwide in the MDU market "for twenty years" and that "vigorous competition" has therefore been present. While small pockets of SMATV and MMDS competition have realistically been present for perhaps ten years, many markets have been entered only during the last five years and a great many more markets still remain to be entered. Thus, Time Warner Cable's stated rationale for when the FCC has employed fresh look policies in the past is directly applicable here, i.e., "to make way for new entrants where no competitive alternatives previously existed" and "where the contracts in

leave it" contract by a monopolist, MDU owners "take it" in light of the uneconomic alternative of drastically reduced tenant occupancy rates in buildings without video programming services. Here, unlike the market conditions surrounding exclusive contracting by new entrants who at a minimum face negotiating competition from the incumbent cable franchisee, exclusive perpetual contracts appear classically anti-competitive according to Professor Whinston's model because of the existence of third parties, such as PCOs, "negatively impacted by such contracts who were not part of the negotiations over it" and because MDU owners might "not have foreseen any possibility of future competition in the video programming distribution" market and thus would have extracted very little in exchange for that exclusive perpetual arrangement. Report at ¶ 24. While this is similarly true even for non-perpetual exclusive contracts entered into by incumbent franchisees prior to the time period in which MDU owners had competitive alternatives available, at least exclusive contracts containing a term of years guarantee that at some definite point in the future the MDU contract will again be subject to competitive bidding. By contrast, perpetual exclusive contracts "lock-up" the buyer beyond the point of social efficiency. It is telling that not one franchised cable commenter presented any economic evidence or other business justification for why contracts lasting in perpetuity are pro-competitive.[6]

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question had been rendered unreasonable due to a change in a regulatory policy which had previously protected monopolies." Comments of Time Warner Cable at 9.

[6] Arguments tended to center on why such contracts are not perpetual at all or are very few in number. With respect to the former, this Commission is well aware of the incredible rarity of any revocation or other non-renewal of a cable franchise. While Time Warner Cable attempts to pretend that the actual expiration date of a franchise is actually something other than theoretical, marketplace experience proves the wiser. See Comments of Time Warner Cable at 5. It simply cannot be gainsaid that MDU owners with a contract linked to the term of the franchise and any and all renewals or extensions, especially given that those same contracts allow for assignment

This is why ICTA and other commenters have advocated the adoption of a "fresh look" period during which property owners are empowered, on a voluntary basis, to renegotiate perpetual contracts with full consideration of today's service alternatives and from a position of much more equal bargaining power, subject only to the limitation that the new contract must provide for termination on a date certain.[7] See, e.g., Comments of Community Associations Institute at 5-6; Comments of Wireless Cable Association International, Inc. at 11-16. The presumption by franchised cable operators opposing a fresh look policy that such a policy results in the loss of that operator's service contract for that MDU is unfounded. See, e.g., Comments of U S West at 6. Nothing in ICTA's fresh look proposal prohibits an MDU owner from continuing with the perpetual contract, or from renegotiating a term of years contract with the cable franchisee as opposed to an alternative MVPD. What the fresh look proposal does accomplish, however, is the restoration of a competitive balance that heretofore monopoly franchising conditions prevented. It should also be remembered that the fresh look period is an

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and continuation, are stuck with the incumbent franchise holder ad infinitum. With respect to the latter, ICTA vehemently disagrees. Whole markets such as, but not limited to Lansing, Michigan; Phoenix, Arizona; jurisdictions in Baltimore County and Montgomery County, Maryland; San Diego, California; jurisdictions in Orange County, California; and Miami and other jurisdictions throughout Florida, are subject to such contracts and such contracts have routinely been used by such operators as Cox Cable, Time Warner, TCI, MediaOne and Adelphia Cable to name but a few. Contrary to the assertion in U S West's comments at 7, ICTA members have repeatedly alleged that "such agreements are keeping them out of the MDU video programming marketplace" where such agreements saturate a market.

[7] For the reasons set forth at 13-14 in ICTA's initial comments in the Second Further Notice, for a fully competitive market to evolve, a fresh look mechanism must apply to both exclusive and non-exclusive perpetual contracts given the market reality that new entrants will not overbuild an incumbent franchisee. For this same reason, the Commission should reject Time Warner Cable's arguments at pages 10-11 of its comments that any fresh look policy should only allow MDU owners to negate the exclusivity portion of a perpetual contract, not the actual provision of service on a perpetual basis.

extremely limited three year process commencing on the effective date of the FCC's adoption of rules in this regard and is only triggered on a building-by-building basis.

Finally, this Commission should reject the arguments of many incumbent cable franchisees that should the Commission decide to place restrictions on exclusive contracts, including those lasting in perpetuity, those restrictions should only pertain to future exclusive contracts. See, e.g., Comments of U S West at 6; Comments of Cox Communications, Inc. at 4-8; Comments of NCTA at 2-4. ICTA agrees with the basic proposition at page 8 of the Comments of RCN Telecom Services, Inc. that the "worst possible scenario for advancing competition would be one where cable operators are permitted to keep their long-term exclusive contracts while new [entrants] are denied the ability to enter into similar agreements."

The Commission should also reject the arguments of incumbent cable franchisees and other commenters that exclusive contracts should be limited to five years. See, e.g., Comments of Cox Communications, Inc. at 10; Comments of Bell Atlantic at 2-4; Comments of Cablevision Communications, Inc. et al. at 4. While these commenters baldly conclude that five years is a sufficient period of time to "recover investment," any reasoned examination of the market, especially for new entrants with low economies-of-scale, easily supports the opposite conclusion. ICTA extensively briefed in its initial comments at 4-11 why marketplace variables render such attempts to establish a "cap" totally arbitrary and, as Professor Whinston's Report clearly concludes at ¶ 8, balancing the low risk to competition posed by exclusive contracting by new entrants versus the pro-competitive benefits achieved in the market due to such exclusive contracting, the Commission should simply refrain from placing artificial constraints on the duration of exclusive contracting by new entrants. Accord, Comments of Building Owners and

Managers Association International et al. at 2-4. Moreover, as also set forth in ICTA's initial comments at 5, 8, there are many benefits extracted by a MDU owner on behalf of its residents in exchange for exclusivity that raise a PCO's investment far beyond just capital costs, e.g., specialized programming offerings, reduced rates, bulk agreements, customer service protections. Recovery of this investment must also thus be taken into account. Accord, Comments of Tele-Communications, Inc. at 27-28.

In sum, ICTA urges this Commission not to impose a "cap" on the length of exclusive MDU contracts by new entrants, or in the alternative, that any "cap" that is adopted should not be less than fifteen years. Since contracts lasting in perpetuity, be they exclusive or non-exclusive, pose an entirely different anti-competitive barrier to entry, ICTA urges the Commission to adopt a "fresh look" policy along the lines advocated by ICTA.

II. The Commission Should Exempt Small Operators As Currently Defined From Signal Leakage Reporting Requirements

ICTA reiterates its support for the Commission's proposal to exempt small broadband providers from the annual signal leakage reporting requirements set forth in Section 76.615(b)(7). Opponents to the Commission's proposal have simply not made the case that aeronautical safety will be compromised by such an exemption which would appear to be the sole rationale for not creating the exemption. After all, an exemption from the annual reporting requirement does not release such operators from their actual testing obligations or in any way reduce the Commission's enforcement power. In light of congressional directives to reduce regulatory burdens where feasible and non-injurious to public welfare, adoption of the exemption represents good policy-making.

III. The Vast Majority Of Commenters Oppose Forced Sharing Of Home Run Wiring

In its initial comments at 17, ICTA suggested that any sharing of home run wiring should remain a voluntary, marketplace decision by the parties involved given the technical and economic variables surrounding that use and the potential for Fifth Amendment takings challenges. Most other commenters similarly objected, focusing in large part on the lack of a technical solution allowing a simultaneous, non-interfering use of a single piece of coaxial cable by multiple providers. See, e.g., Comments of U S West at 8-9; Comments of Time Warner Cable at 20; Comments of NCTA at 8-12. In light of the extensive opposition and trepidation over the ability to technically, practically, economically and legally force a shared simultaneous use of home run wiring, the Commission should leave the existence and timing of such dual use up to the players in the marketplace.

CONCLUSION

For the reasons discussed above, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments herein.

Respectfully submitted,

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Service Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
Cable Home Wiring	)	

To: The Commission

COMMENTS OF INDEPENDENT CABLE &
<u>TELECOMMUNICATIONS ASSOCIATION</u>

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To: The Commission

COMMENTS OF INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

The Independent Cable & Telecommunications Association ("ICTA") submits these comments in response to the Second Further Notice of Proposed Rulemaking (the "Second Further Notice") in the above-encaptioned proceeding.[1]

1/ DirectTV, while a member of ICTA, does not join in these comments, but rather submits its own response to the Second Further Notice.

ICTA represents a cross-section of companies operating in the forefront of the telecommunications revolution now taking place in the United States. Its members include private cable operators (also referred to as satellite master antenna television), shared tenant services providers, competitive local exchange carriers, direct broadcast satellite operators, equipment manufacturers, program distributors and property management-development companies. ICTA's operator members employ a variety of telecommunications technologies, both wired and wireless, to offer video, voice and data communications services primarily to the residential multiple dwelling unit ("MDU") market. With regard to video services, these operators primarily compete with franchised cable operators, the dominant player in the local multichannel video programming distribution market. The issues raised in the Second Further Notice are of critical importance to ICTA since the Commission's conclusions will, in large part, determine whether ICTA's operator members are able to build upon their current toehold in the market for distribution of video programming services and present meaningful competition to incumbent franchised cable operators over the long term.

SUMMARY

In its comments, ICTA focuses on the issues the Commission has raised regarding potential limitations on the use of exclusive contracts, the treatment of "perpetual contracts," the obligations of small operators to monitor for signal leakage and the feasibility of shared use of home run wiring.

ICTA urges the Commission not to impose any external limit on the duration of exclusive service contracts, which ICTA believes to be an essential pro-competitive tool. Exclusive contracts are critical to the ability of private cable operators to finance new projects

and provide alternatives to franchised service in markets where property owners have historically enjoyed no other option. Should the Commission ultimately decide to impose a cap on these contracts, ICTA asks that it not be less than fifteen years. It is only over such a period that private operators can recoup costs and solidify their financial position to the extent that they can withstand competition from a franchised operator subsidized by its city or county-wide operations. Such a duration is appropriate given that it corresponds to the period of *de facto* exclusivity granted to most franchised operators as they began operations in the 1970's. Also, if experience indicates that this period is excessive, the Commission could simply revisit the issue with no harm to franchised operators developing in the interim. However, if the Commission imposes a cap of insufficient length, private operators may be forced out of the market by the time the Commission can take corrective action. Finally, ICTA points out that mandatory access statutes almost always authorize franchised operators alone to force access and exclude private operators from their reach. Franchised operators can therefore preempt a private operator's exclusive contractual arrangement while its own such contracts remain shielded. In order to avoid this highly inequitable result, ICTA urges the Commission to prohibit franchised operators from obtaining exclusive contracts in states which have enacted mandatory access statutes.

ICTA proposes that the Commission establish a three-year "fresh look" period during which property owners would be able to renegotiate both exclusive and non-exclusive "perpetual contracts." The policy should apply not only to contracts which extend for the duration of the franchise and any renewals or extensions, but also to other contracts with no duration language or language that in practical effect results in a perpetual term, such as language linking termination to some future uncertain event.

ICTA supports the exemption of small operators from the reporting requirements related to signal leakage monitoring obligations. In implementing the exemption, ICTA suggests using a definition similar to that of "small cable operator."

Finally, ICTA argues that the issue of whether competitors should share a home run wire should be decided by the parties themselves based upon technical and economic factors. ICTA believes that forced sharing of the wire would result in *de facto* mandatory access rights and raise Fifth Amendment concerns.

DISCUSSION

I. Exclusive Contracts Are A Pro-Competitive Tool For New Entrants And Their Duration Should Not Be Capped, But If It Is, The Exclusivity Period Should Extend At Least 15 Years

In the Second Further Notice, the Commission seeks comment on whether it should adopt a "cap" on the length of exclusive contracts entered into by MDU owners and service providers, limiting their enforceability to the time period necessary for a provider to recover the specific capital costs involved in initiating service at the MDU. The collective experience of ICTA's members indicates that exclusive contracting by private cable operators is absolutely essential to their ability to compete with incumbent franchised operators and that it promotes the best interests of MDU residents. ICTA therefore respectfully submits that a cap on the duration of exclusive contracts is not only unnecessary to promote the goal of increased competition in the market for the distribution of video programming services, it would stifle the competition that is only now taking hold. However, should the Commission decide that a cap would serve the public interest, ICTA strongly urges that any such measure allow exclusivity to extend for a period of at least 15 years, the same period of express or *de facto* exclusivity enjoyed by franchised operators when they were initiating operations 25 years ago.

As ICTA has emphasized throughout this proceeding, exclusive contracts do not inevitably inhibit competition. Some parties have limited their analysis of the competitive effect of exclusive contracts to the confines of a single MDU and argue that these contracts simply result in the replacement of one "monopolist" with another. However, the relevant geographic market for the distribution of video programming services is not the grounds of a single MDU. Rather, it is coextensive with the franchise area which usually extends throughout the entire incorporated area of a city or county. While exclusive contracts may prevent a provider from offering its services at a particular MDU, they do not prevent a provider from entering the geographic market as a whole and competing "at the property line." The various providers vie to convince a property owner that they are best able to offer the mix of services desired by current and prospective tenants at the best price, rather than competing at each tenant's door. Thus several providers can operate in a given market, each with a handful of exclusive contracts at particular MDUs, and the market will still be fully competitive as a result of the vigorous competition that has taken place property-by-property. ICTA urges the Commission to look beyond the misplaced focus of some parties on the type of door-to-door competition that takes place in the single family home context and recognize that competition simply plays out in a dramatically different manner in the MDU environment.

Not only does exclusive contracting not thwart competition, it is a critical ingredient to <u>insuring</u> competition since only with a <u>long-term</u> period of exclusivity can private cable operators and other new entrants generally attract the investment and secure the <u>long-term</u>

financing necessary to initiate operations and present meaningful long-term competition to franchised operators. Given the small subscriber base of any particular MDU as compared with an entire municipality, and the absence of any real economies of scale, a private cable operator must have some period of exclusivity as a new entrant in order to ensure a cash flow return sufficient to achieve a reasonable profit which is, after all, the sine qua non for any debt and/or equity investment. A private cable operator typically must install a complete stand-alone cable system, including satellite dishes, electronics and descrambling equipment at nearly every private property they serve.[2/] The presence of an additional provider would simply render it economically infeasible to provide service, i.e., the available subscriber base, now "shared," is too small to justify the capital investment.[3/] This fact is demonstrated by the following model which is based upon a 300-unit MDU and assumes that the private operator is unable to secure exclusivity *vis-a-vis* an incumbent franchised operator currently servicing the MDU.

- The fixed costs involved in installing a high-end stand-alone system at an MDU is approximately $617 per passing or $185,000 total for these 300 units.

- The average penetration for cable service at MDUs is 60%. Under the very best of circumstances, a competitor can expect to obtain 50% of those subscribers from the incumbent, or 90 subscribers, due to subscriber complacency and the resulting hesitancy to switch providers.

[2/] Some ICTA members utilizing different technology may not have as great a need for a long-term period of exclusivity.

[3/] The situation of the private cable operator is in stark contrast to that of the cable franchisee who can serve a new MDU simply by stringing additional cable from the building to the nearest public street for interconnection to its franchise-wide single family headend facility. While a cable franchisee can amortize its installation expenses over its entire franchise area, a private cable operator in most instances must amortize its expenditures (which are nearly four times higher) over only the single property served.

- Fixed costs, spread among the 90 subscribers, would equal approximately $2,055 per subscriber.
- Monthly gross revenue averages $36 per subscriber in better markets, which would equal a total of $38,880 in gross revenue for the year.
- Cash flow equals around 35% of revenue or approximately $13,600 per year in this model.

In the model, the ratio between annual cash flow and debt would be 13.5 to 1. Lending institutions strongly prefer this ratio to be in the range of 4 to 1 and virtually no such entity will provide financing if it is greater than 6 to 1. If the provider is allowed to provide service pursuant to an exclusive access agreement, however, subscribership and thus revenue would double and the cash flow/debt ratio would be more in line with lending and investment standards. Moreover, without exclusivity, the fixed costs per subscriber are greatly above the market average of $1,000 per subscriber that is paid to acquire SMATV systems. Investment under these circumstances would therefore be difficult to justify since even the resale price of a subscriber would not allow recoupment of such fixed costs.

A longer term period of exclusivity also provides new entrants with an essential degree of protection while they recoup costs. Without the protection of exclusivity, a new entrant could easily succumb to the predatory practices of the incumbent who has already recouped and can therefore easily undersell its new competitor and lure away subscribers with special promotions. For example, a cable franchisee can subsidize head-to-head competition at a particular MDU with revenues obtained from its franchise-wide single family subscriber base.[4/]

[4/] Although uniform pricing laws and regulations are helpful in this area, sufficient "loopholes" exist such that cable franchisees can continue such cross-subsidization. Indeed, the protection provided by the uniform pricing provisions of the Communications Act has been

The lending and investment community is well aware of the critical need for exclusivity given the infancy of the private cable industry as juxtaposed to the market dominance of the incumbent cable franchisees, and refuses to participate in private cable operations unless a long-term period of exclusivity is guaranteed. With the vast majority of MDUs already serviced by franchised cable operators, a cap that unduly limits exclusive contracting would mean that at almost all MDUs potential competitors would be unable to finance even the start-up of their operations, much less have any "staying power." As a result, franchised operators would be left without competitors and both MDU owners and tenants would be left without a choice of providers.

A longer term period of exclusivity not only promotes competition, it preserves the owner's constitutionally-protected private property rights and is clearly the best method to advance the interests of the residents. The property owner, because it represents a large group of customers as a "package," is able to negotiate a far better deal from the service provider than a single tenant with no leverage. Because the owner is itself faced with competition in the rental market, it has every incentive to ensure that the chosen provider will offer the highest quality services at competitive prices so that potential tenants will be attracted to the property. The provider, in turn, is able to use exclusivity as the means to unlock supracompetitive offerings. With the guarantee of the entire customer base, a provider can afford to offer more expansive

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limited by the 1996 Telecommunications Act, which now prohibits only "predatory" non-uniform bulk discounts. Moreover, such laws do not even apply in areas subject to effective competition even though the particular competitor targeted at a single MDU by a cable franchisee may not have sufficient market-wide penetration so as to withstand a price war. Nor do such laws preclude discriminatory pricing for services other than rate regulated services and associated installation and equipment costs.

services and/or pass on cost savings to the tenants. Currently, where sufficient volume can be secured through exclusivity for periods of time in excess of twelve years, private cable operators typically offer services at rates 10-15% below the next highest competitive rate for video programming services at the individual tenant level.

For the foregoing reasons, ICTA believes that longer term exclusive contracts are a prerequisite to competition, not a hindrance, and that no limit on their duration is necessary other than the prohibition of perpetual contracts discussed in Section II below. Should the Commission find otherwise and impose a cap on the duration of exclusive contracts, ICTA urges it to do so only with respect to future contracts and to permit at least a fifteen-year period of exclusivity. It is only over such a period that a private operator can recoup costs and reach a level of cash flow sufficient to demonstrate both a profit and an ability to withstand the onslaught of a franchised operator with a war chest built upon its city or even county-wide operations. Any more restrictive limit would have a debilitating effect on the ability of private operators to sustain operations and would destroy the ability of private operators to finance new systems.[5] In short, the nascent competition faced by franchised operators from these private operators would be eliminated.

The time period ICTA proposes has a proven track record. Most cable franchises were originally granted for fifteen-year terms and either expressly provided for exclusivity or

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[5] While ICTA has previously noted that a private operator's base recoupment period is at least 5 to 6 years, it does not promote such a period as the minimum span of exclusivity necessary to establish a reasonable profit beyond that bare recoupment, to achieve overall economic viability and stability in a fiercely competitive market, or to satisfy actual and potential investors and lenders. ICTA respectfully notes that the Commission's suggestion of such an intent in footnote 737 of the Second Further Notice is in error.

were *de facto* exclusive. When the franchisees were entering the emerging market for hardwire video programming delivery 25 years ago, all parties involved - the franchisees, their investors and lenders, and the franchising authorities - recognized that the investment involved in installing the systems could not be justified without the protection of such a period of express or *de facto* exclusivity. It would be highly inequitable for the participants in today's emerging market for alternative video service delivery to be denied such protection, especially when, unlike those first franchisees, they face intense competition from an entrenched incumbent.

Should the experience of history prove wrong and should the market become fully competitive in the next few years, transforming a fifteen-year cap into an impediment to competition, the Commission could simply revisit this issue. Franchised operators surely will not be harmed in the interim given that they control the lion's share of the MDU market and virtually all of the market for distribution of video programming services to single-family homes. Indeed, five years after the implementation of the pro-competitive measures of the 1992 Cable Act, franchised operators face effective competition in only a handful of markets. On the other hand, if the Commission unduly restricts the duration of exclusive contracts now, competition from private operators and new entrants, already hounded by an increase in permissible "predatory" activity, will slowly diminish as they are driven out of the market and their access to start-up capital evaporates. Once gone, these operators will not soon reappear even if an overly restrictive cap is lifted. In short, while the Commission can easily remedy the grant of too much freedom regarding the use of exclusive contracts, it cannot easily remedy the damage that would result from being overly restrictive.

Finally, the answer to the Commission's inquiry in ¶ 262 of the Second Further Notice as to whether its "decision not to preempt state mandatory access statutes effectively means that non-cable MVPDs cannot enforce exclusive agreements in those states, even where such agreements may be pro-competitive" is a resounding yes. Conversely, because these statutes rarely grant access rights to alternative providers, franchised operators are able to force access to a property and enter into an exclusive contract with the owner that is subject to no such risk of nullification by a third party. In light of this highly inequitable result, ICTA urges the Commission to level the playing field by prohibiting franchised operators from obtaining exclusive contracts in states that have enacted a mandatory access statute. The prohibition could be tied directly to the existence of the access statute so that if the statute is repealed, the prohibition would be lifted and all parties would remain on equal footing.

II. The Commission Should Clearly Define What Constitutes A "Perpetual Contract" And Establish A "Fresh Look" Period During Which Property Owners Can Renegotiate These Anti-Competitive Agreements

In light of their overwhelming anti-competitive effect, ICTA urges the Commission to establish a "fresh look" period during which property owners are empowered to renegotiate "perpetual contracts" with full consideration of today's service alternatives and from a position of much more equal bargaining power. As a preliminary matter, the Commission must be as clear as possible regarding what contracts are considered perpetual and therefore subject to a fresh look.

The Commission refers to perpetual contracts as "those running for the term of a cable franchise and any extensions thereof." Second Further Notice at ¶ 263 (emphasis added).

Service agreements between franchised operators and property owners also often specify a term lasting for "the duration of the franchise and any renewals of the franchise." As discussed by ICTA in earlier comments, such contracts undoubtedly will extend in perpetuity given that it is exceedingly rare for a franchise not to be renewed. Furthermore, the agreements are typically transferable to "successors and assigns." Accordingly, as the franchise is continually renewed and/or the rights of the franchised operator are continually transferred to a successor, the property owner is effectively locked into the agreement in perpetuity.[6] Thus, ICTA respectfully submits that in adopting a definition for "perpetual contract," the Commission must make clear that all contracts with a durational term linked to the "renewal" and/or "extension" of the franchise are included.

ICTA also urges the Commission to rule that a contract stating that it will continue "for the term of the franchise," but which is silent with regard to renewals or extensions, simply terminates upon expiration of the franchise in existence when the contract was executed. If the Commission declines to make that affirmative ruling, ICTA urges it to treat such contracts as perpetual. The initial term of a franchise is often as long as 25 years and franchised operators currently attempt to expand the duration of these contracts beyond even that period by arguing that their "intent" at execution was that such language implicitly included extensions and renewals of the franchise as well. See, e.g., Attachment 1 hereto.

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[6] Of course, not every operator's intent was to foreclose competition in perpetuity. At the time some of these contracts were entered into, there was a legitimate chance that a city might not renew the franchise and thus a duration linked to the renewal was not necessarily perpetual. It was passage of the 1984 Cable Act and the measures contained therein making it virtually impossible for a city to deny renewal that transformed contracts containing this type of durational provision into perpetual contracts.

In order to preempt clever drafting efforts intended to avoid renegotiation, the perpetual contract definition must make clear that other words or constructions having the practical effect of perpetuity will be treated as such for "fresh look" purposes. For example, linking the duration of a contract to some contrived, uncertain event such as "when the parties deem the agreement impractical" or when "the franchisee ceases operations," should be considered to create a perpetual contract subject to renegotiation. ICTA also strongly believes that contracts with no durational term must be included within the definition given that courts may treat such contracts as perpetual. Moreover, while many courts would treat the contract as terminable at-will, an incumbent would not acquiesce in such an interpretation. Rather, it would require a lawsuit to obtain that judicial construction and such an expense would deter the property owner from asserting its termination right.

Finally, on a related point, ICTA strongly urges the Commission not to exclude non-exclusive perpetual contracts from any "fresh look" policy it adopts. In the Second Further Notice, the Commission has requested comment regarding only perpetual exclusive contracts, implying that a perpetual contract must also be exclusive before any fresh look mechanism would apply. However, even if a contract lasting in perpetuity does not contain an exclusivity provision, as explained in Section I above, it would not be economically feasible for an alternative provider to provide service to the property in tandem with the franchised operator. If they are foreclosed in perpetuity from obtaining the exclusivity necessary to initiate operations, these potential competitors will never challenge incumbents and the market will never be re-energized by competition among providers for the right to serve properties as existing contracts expire. Thus, if a fully competitive market is to result, a fresh look mechanism must apply to both exclusive and non-exclusive perpetual contracts.

With the parameters of what is considered a "perpetual contract" clearly defined in the foregoing manner, ICTA believes the Commission should institute a "fresh look" mechanism allowing a property owner subject to a perpetual contract freely to renegotiate that contract or enter into an agreement with another provider, subject only to the limitation that the new contract must provide for termination on a date certain. Such a mechanism is warranted in light of the overwhelming burden on competition that these contracts present.

ICTA respectfully submits that the Commission cannot achieve its goal of creating a truly competitive market for the distribution of video programming services unless it eliminates the restriction on competition that results from perpetual contracts. While not every franchised operator chose to use a model contract with a perpetual duration, those that did so relied upon that model throughout the entirety of their franchise area. Thus, it is not just random MDU's at which competition is forever precluded by these contracts. Rather, entire franchise areas are sealed off from competition. Moreover, these contracts are still in use today in markets to which alternative providers have not been able to extend their reach and thus where property owners have no service option other than franchised cable. In either circumstance, because franchised service was or is the only option, these perpetual contracts are in essence "contracts of adhesion." Property owners have to provide video programming services in order to attract tenants. Twenty years ago there was only one place to get them and in many places today that is still the case. Property owners therefore did not have, and often still do not have, any leverage in their dealings with franchised operators. If perpetual contracts entered into under these circumstances are to be enforceable under traditional contract principles, they must be renegotiated in an environment of relatively equal bargaining power as service alternatives become available to property owners.

ICTA suggests that the "fresh look" period start on the effective date of the FCC's adoption of rules in response to this Second Further Notice and last for three years. The mechanism should be triggered on a building-by-building basis. When the owner of an MDU believes that there are competitive alternatives to the franchisee's service available to it, it can invoke the mechanism and solicit competing offers of service. Nothing in such a regime would prevent the property owner from simply entering into another contract with the incumbent operator, with or without entering into a second agreement with a competing provider. It would simply empower the owner to transform an anti-competitive contract into one that will be subject to renegotiation at set intervals and thereby forced to stand the test of competition. Indeed, the incumbent presumably would have the advantage due to property owners' general hesitancy to switch providers and the fact that it almost surely will have recouped its costs already.

As long as the owner initiates the renegotiation process during the three-year period, the owner should be allowed to continue negotiations beyond the expiration of the period should they so extend. ICTA also believes that it is critical that any "fresh look" mechanism involve a prohibition on retaliatory action by the incumbent. The incumbent cannot be allowed to terminate service or threaten to do so in response to an owner's assertion of its right to renegotiate. Otherwise, the owner's right in this regard would be meaningless since it would not want to risk the harm to its tenants that would result from a service interruption.

By empowering the property owner to initiate the "fresh look" mechanism, the Commission will ensure that it is invoked only when alternatives to the incumbent's service actually exist such that a true renegotiation can take place and will avoid having to involve itself in the details of the process. Moreover, the renegotiation could easily result in the conversion of the building to a new provider, or conceivably to a dual provider scenario. In either case, it will be necessary to invoke the new Cable Inside Wiring Rules which establish the property owner as the initiator of the disposition procedures. Thus, the party that triggers the "fresh look" mechanism would also be the party empowered to initiate the disposition procedures which would need to be invoked in many instances.

III. The Commission Should Exempt Small Operators From Signal Leakage Reporting Requirements And Should Do So Based Upon Its Existing Definition In The Cable Context

ICTA agrees with the Commission that the requirement contained in Section 76.615(b)(7) that operators file an annual report regarding the results of the signal leakage tests required by Section 76.611 would needlessly raise the engineering and compliance costs of small broadband service providers without a concomitant increase in aeronautical safety. ICTA therefore supports an exemption from the reporting requirements of Section 76.615(b)(7) for small operators, though such operators would of course remain obligated to perform the actual testing.

ICTA suggests that in implementing the exemption and identifying "small broadband providers," the Commission rely upon the existing definition used to identify "small cable systems" and "small cable operators" set forth in the Sixth Report and Order and Eleventh

Order on Reconsideration, MM Dkt. Nos. 92-266, 93-215, 10 F.C.C. 7393, 7406. Under this definition, a small system is one with 15,000 or fewer subscribers and a small company is one with 400,000 or fewer subscribers over all of its systems. ICTA proposes that the Commission measure subscribership in "small broadband system" determinations within the boundaries of individual counties. Thus, ICTA proposes that a broadband system that serves 15,000 or fewer subscribers within a county and that is run by an operator with 400,000 or fewer total subscribers, be exempt from the signal leakage reporting requirements.

IV. The Decision Whether Competing Providers Should Share Home Run Wiring Should Be Left To The Parties, The Market and Technology

In the Second Further Notice, the Commission seeks comment on the feasibility of requiring competing broadband service providers to share a single home run wire in MDUs. ICTA respectfully submits that whether two competitors should share the home run wire is a technical and economic decision that is a question best left to market forces and market participants themselves to decide and simply does not lend itself to a regulatory solution.

As the Commission itself recognized in the Cable Inside Wiring Rules, it is up to the property to decide whether to permit a competing provider onto the property. Once that decision is made, the market and technological realities will dictate whether the competitors can or should share the wiring. To force the parties to share the wiring would in essence result in the creation of mandatory access rights. Such a situation raises all of the Fifth Amendment problems involved in non-consensual access issues which the Commission chose to avoid elsewhere in this proceeding.

CONCLUSION

For the reasons discussed above, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments herein.

Respectfully submitted,

INDEPENDENT CABLE &
TELECOMMUNICATIONS ASSOCIATION

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